In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES, APPELLANT,
v.
MASON & HANGER COMPANY, APPELLEE. } No. 410.

PETITION FOR A WRIT OF CERTIORARI ON SUGGESTION OF DIMINUTION OF THE RECORD.

Comes now the Solicitor General on behalf of the appellant in the above-entitled case and suggesting to the court a diminution of the record on appeal by the omission therefrom of the matter hereto attached marked "Exhibit A," and which constituted a part of the record in the court below, moves the court that a writ of certiorari issue to bring such omitted matter before this court.

In its request for findings of fact the appellant, the defendant below, on April 2, 1921, requested, among other things, that the Court of Claims make the following finding of fact, to wit:

IX.

On June 28, 1917, instructions were sent to the plaintiff as follows (p. 38, middle):

"You will at once obtain insurance protecting material against fire during time between delivery by carrier and acceptance by Govern-

ment, also such workmen's compensation insurance as required by statutes. Other insurance risks assumed by Government. Your attention directed to clause H, article 2, whereby Government does not assume responsibility for losses and expenses resulting from fault or neglect. Detailed instructions mailed."

Subsequently, on July 17, 1917, Maj. W. A. Dempsey, in a communication to the constructing quartermaster, Louisville, Ky., returned the policies of insurance transmitted on July 14, 1917, which constitute the basis of this claim (Report, War Department, pp. 99, 100), unapproved, stating the fact that no such policies had been authorized in any previous instructions.

Said policies were procured without the approval or requirement of the contracting officer at the time they were taken out and said contracting officer formally disapproved same.

In its findings of fact and the conclusion of law announced on April 18, 1921, in the above-entitled case, the Court of Claims omitted to make the aforesaid requested findings.

On June 11, 1921, the appellant moved said court to correct its finding of fact V and its conclusion of law in pursuance with Exhibit A, hereto attached.

On June 13, 1921, the aforesaid motion was argued and overruled.

On June 28, 1921, the appellant filed with the aforesaid court an application for an appeal from its judgment to this honorable court.

On June 30, 1921, the aforesaid application for an appeal was allowed.

On July 6, 1921, the appellant received from the clerk of the aforesaid court the transcript of record, which, upon examination, disclosed that the appellant's motion to amend the court's finding of fact V and the conclusion of law (Appellant's Exhibit A) had been omitted therefrom.

On July 7, 1921, the appellant filed with the aforesaid court a motion praying for leave to have the aforesaid motion to amend incorporated in the transcript of record.

On July 9, 1921, the aforesaid court overruled the appellant's motion to incorporate the aforesaid Exhibit A in the transcript of record.

Wherefore, the appellant herein now prays the issuance of the writ hereinbefore requested.

JAMES M. BECK,
Solicitor General.

EXHIBIT A.

DEFENDANT'S MOTION TO AMEND FINDINGS OF FACT.

Now comes the defendant, by the Attorney General, and moves the court to amend the findings of fact filed herein on the 18th day of April, 1921, as follows:

V.

Amend the fifth finding, on page 2 of the findings of fact, by striking from the first sentence in the finding the phrase, "Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer."

Amend the balance of the sentence to read:

> Before work was actually started under the contract the plaintiff company took out policies of insurance of the following character (p. 25, qq. 15, 16, 20, line 8): Public liability insurance, automobile liability insurance, and burglary and holdup insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52.

After the words "to the sum of $9,114.52" insert the following amendment:

> Article II, subdivision (h) of the contract of June 20, 1917 (p. 9), provides that "fire, liability, and other insurance" shall be taken out by the plaintiff company "as the contracting officer may approve or require."

On June 28, 1917 (plaintiff's Exhibit No. 7, p. 38, middle), the contracting officer sent out instructions to the plaintiff company as follows: "You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensations insurance as required by statutes. *Other insurance risks assumed by Government.* Your attention directed to clause H, article two, whereby Government does not assume responsibility for losses and expenses resulting from your fault or neglect. Detailed instructions mailed." [Italics ours.]

CONCLUSION OF LAW.

Amend the "Conclusion of law" (p. 3) by striking out the words "and the sum of $9,114.52 as found in Finding V" (*line* 4).

Whether the court amends the conclusion of law or not, counsel for the defendant request that the additional facts and the proposed amendment requested be inserted in Finding V.

ROBERT H. LOVETT,
Assistant Attorney General.

JOHN E. HOOVER,
FRANK E. SCOTT,
WILLIAM F. NORRIS,
Attorneys.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES, APPELLANT,
v.
MASON & HANGER COMPANY,
appellee.
} No. 410.

APPEAL FROM THE COURT OF CLAIMS.

DEFENDANT'S MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY A SPECIFIC FINDING OF FACT, AND BRIEF.

Comes now the Solicitor General on behalf of the appellant in the above-entitled cause and moves this honorable court to remand the record in this cause to the Court of Claims with instructions to find and certify to this court, as a matter of fact, in addition to the facts found and certified in said record—

Whether or not the contracting officer named in the contract of June 20, 1917, between the United States and the appellee, issued the following instructions to said appellee on June 28, 1917:

> You will at once obtain insurance protecting material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensation insurance as required by statutes. Other insurance risks assumed by Government.

> Your attention directed to clause H, article 2, whereby Government does not assume responsibility for losses and expenses resulting from fault or neglect. Detailed instructions mailed.

In its request for findings of fact the appellant, the defendant below, on April 2, 1921, requested, among other things, that the Court of Claims make the following finding of fact, to wit:

IX.

> On June 28, 1917, instructions were sent to the plaintiff as follows (p. 38, middle):
>
> "You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensation insurance as required by statutes. Other insurance risks assumed by Government. Your attention directed to clause H, article two, whereby Government does not assume responsibility for losses and expenses resulting from fault or neglect. Detailed instructions mailed."
>
> Subsequently, on July 17, 1917, Maj. W. A. Dempsey, in a communication to the constructing quartermaster, Louisville, Ky., returned the policies of insurance transmitted on July 14, 1917, which constitute the basis of this claim (Report, War Department, pp. 99, 100), unapproved, stating the fact that no such policies had been authorized in any previous instructions.
>
> Said policies were procured without the approval or requirement of the contracting

officer at the time they were taken out and said contracting officer formally disapproved same.

In its findings of fact and the conclusion of law announced on April 18, 1921, in the above-entitled cause, the aforesaid Court of Claims, among other findings of fact, made the following finding and conclusion of law:

V.

Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer, the plaintiff took out policies of insurance of the following character: Public liability insurance, automobile liability insurance, and burglary and hold-up insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52. Maj. Dempsey, who on July 16, 1917, had ceased to be the contracting officer, on July 17, 1917, refused to approve the payment of premiums on these policies; but upon full payment of these premiums a voucher for the same was submitted by the plaintiff to the constructing quartermaster at the place of construction and by him transmitted to the War Department. On December 22, 1917, Col. I. W. Littell, the contracting officer, approved the action of the plaintiff in taking out the policies of insurance above referred to and authorized and directed the constructing quartermaster to pay to the plaintiff the sum of $9,114.52, the amount of the premiums paid by it on said policies. The said quartermaster submitted the question of payment of the afore-

said amount to the Comptroller of the Treasury, who decided that the said amount should not be paid to the plaintiff, and said amount has not been paid by the United States to the plaintiff.

CONCLUSION OF LAW.

The court, upon the foregoing findings of fact, decides as a conclusion of law that the plaintiff is entitled to recover the sum of $2,500 as found in finding III, the sum of $450 as found in finding IV, and the sum of $9,114.52 as found in finding V. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twelve thousand and sixty-four dollars and fifty-two cents ($12,064.52).

On June 11, 1921, the appellant moved said court to correct its finding of fact V and its conclusion of law, as follows:

DEFENDANT'S MOTION TO AMEND FINDINGS OF FACT.

Now comes the defendant, by the Attorney General, and moves the court to amend the findings of fact filed herein on the 18th day of April, 1921, as follows:

V.

Amend the fifth finding, on page 2 of the findings of fact, by striking from the first sentence in the finding the phrase, "Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer."

Amend the balance of the sentence to read:

"Before work was actually started under the contract the plaintiff company took out policies of insurance of the following character (p. 25, qq. 15, 16, 20, *line 8*): Public liability insurance, automobile liability insurance, and burglary and holdup insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52."

After the words "to the sum of $9,114.52," insert the following amendment:

Article II, subdivision (h), of the contract of June 20, 1917 (p. 9), provides that "fire, liability, and other insurance" shall be taken out by the plaintiff company "as the contracting officer may approve or require."

On June 28, 1917 (Plaintiff's Exhibit No. 7, p. 38, *middle*, the contracting officer sent out instructions to the plaintiff company as follows: "You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensation insurance as required by statutes. *Other insurance risks assumed by Government.* Your attention directed to clause H, article two, whereby Government does not assume responsibility for losses and expenses resulting from your fault or neglect. Detailed instructions mailed." [*Italics ours.*]

CONCLUSION OF LAW.

Amend the "Conclusion of law" (p. 3) by striking out the words, "and the sum of $9,114.52 as found in finding V" (*line 4*).

Whether the court amends the conclusion of law or not, counsel for the defendant request that the additional facts and the proposed amendment requested be inserted in Finding V.

ROBERT H. LOVETT,
Assistant Attorney General.

JOHN E. HOOVER,
FRANK E. SCOTT,
WILLIAM F. NORRIS,
Attorneys.

On June 13, 1921, the aforesaid motion was argued and overruled.

On June 28, 1921, the appellant filed with the aforesaid court an application for an appeal from its judgment to this honorable court.

On June 30, 1921, the aforesaid application for an appeal was allowed.

On July 6, 1921, the appellant received from the clerk of the aforesaid court the transcript of record which, upon examination, disclosed that the appellant's motion to amend the court's finding of fact V and the conclusion of law, set out in full above, had been omitted therefrom.

On July 7, 1921, the appellant filed with the aforesaid court, in the words and figures following, a motion for leave to have the aforesaid motion to amend incorporated in the transcript of record:

MOTION TO AMEND THE TRANSCRIPT OF RECORD.

Now comes the defendant, by the Attorney General, and moves the court to amend the transcript of record on appeal to the Supreme

Court of the United States by incorporating therein the defendant's motion to amend the court's findings of fact and conclusion of law filed June 11, 1921, in the following words and figures:

Amend the fifth finding, on page 2 of the findings of fact, by striking from the first sentence in the finding the phrase, "Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer."

Amend the balance of the sentence to read:

"Before work was actually started under the contract the plaintiff company took out policies of insurance of the following character (p. 25, qq. 15, 16, 20, *line 8*): Public liability insurance, automobile liability insurance, and burglary and holdup insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52."

After the words "to the sum of $9,114.52," insert the following amendment:

"Article II, subdivision (h), of the contract of June 20, 1917 (p. 9), provides that 'fire, liability, and other insurance' shall be taken out by the plaintiff company 'as the contracting officer may approve or require.'

"On June 28, 1917 (plaintiff's Exhibit No. 7, p. 38, *middle*), the contracting officer sent out instructions to the plaintiff company as follows: 'You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensation insurance as required by statutes.

Other insurance risks assumed by Government. Your attention directed to clause H, article two, whereby Government does not assume responsibility for losses and expenses resulting from your fault or neglect. Detailed instructions mailed.'" [*Italics ours.*]

CONCLUSION OF LAW.

Amend the "Conclusion of law" (p. 3) by striking out the words, "and the sum of $9,114.52 as found in Finding V" (*line 4*).

Whether the court amends the conclusion of law or not, counsel for the defendant request that the additional facts and the proposed amendment requested be inserted in Finding V.

ROBERT H. LOVETT,
Assistant Attorney General.

On July 9, 1921, the aforesaid court overruled the appellant's motion to amend the transcript of record by incorporating therein the prior motion to amend the findings of fact and the conclusion of law.

ARGUMENT.

When it is seen that the appellant is without any valid grounds of defense with this fact omitted from the court's finding of fact No. V (Rec. p. 19), its materiality is at once apparent.

The findings of fact of the Court of Claims are treated as a special verdict.

Under Rule 1 of this court relating to appeals from the Court of Claims it is required that the record shall consist of a transcript of the pleadings in the case, of the final judgment or decree of the court,

and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case. It irresistibly follows, therefore, that the record here on appeal is lacking in the elements "necessary to a proper review of the case" because it omits to include, along with the ruling itself, the motion to amend the findings upon which the ruling is predicated. Without the inclusion of the motion in the record this court is precluded from examining into and determining as to the soundness of the ruling which was objected to with respect to the materiality of a fact requested to be found and upon which the appellant relies for the purpose of making a proper defense.

United States v. *Adams*, 6 Wall. 101;
United States v. *Adams*, 9 Wall. 661;
Mahan v. *United States*, 14 Wall. 109.

The constructing quartermaster referred to in finding V (Rec. p. 19) had no power under the contract, nor was he ever authorized by Maj. W. A. Dempsey, the contracting officer, to instruct the appellee to take out any one of the four different types of insurance sued for and allowed in finding V (Rec. p. 19); contract, Art. II, subparagraph (h) (Rec. p. 8).

While it is true that a memorandum was approved by the Secretary of War on July 16, 1917, whereby Col. I. W. Littell was substituted for Maj. W. A. Dempsey as contracting officer, and while the latter, despite the issuance of said memorandum, continued to serve in the capacity of contracting officer until

December, 1917, yet Maj. Dempsey was never notified, either verbally or in writing, of the substitution of Col. Littell for himself as contracting officer. The fact that Col. Littell had been substituted as the successor of Maj. Dempsey as contracting officer was only accidentally discovered by the latter on July 27, 1917, when he saw the aforesaid memorandum designating Col. Littell as his successor on the desk of the chief clerk.

There was no privity between Dempsey, the original contracting officer, and Littell, his successor. Each of these officers was clothed with similar power to be exercised by them in their independent capacity as contracting officer without limitation or restriction. It necessarily follows, therefore, that any action taken while Dempsey was in the full discharge of the power vested in him as contracting officer was complete, final, and irrevocable, unless, on appeal to the officer in charge of the construction division of the Army or to the Secretary of War (contract, Art. XIV, Rec. pp. 14, 15), his decision should be reversed. No such appeal was taken by the appellee to either of the two officers named. The fact that Dempsey on June 28, 1917 (17 days prior to the substitution of his successor on July 16 and while he was then in full authority as contracting officer), issued instructions forbidding the appellee from taking out the insurance here involved relieved the appellant from the assumption of such a liability and cast the burden for the unwarranted and unauthorized act upon the appellee. In other words, while Littell,

Dempsey's successor, could authorize insurance to begin from the date that he assumed control as contracting officer, yet he could not authorize payment for an act on the part of the appellee which had been expressly prohibited by his predecessor as contracting officer.

Boutwell v. *United States*, 17 Wall. 604, 606–608;
Pullman Co. v. *Croom*, 231 U. S. 571, 575;
Pullman Co. v. *Knott*, 243 U. S. 447, 449;
Shaffer v. *Howard*, 249 U. S. 200, 201.

The appellant by this motion seeks to insure its right to have this court pass on the question of the scope of authority of Maj. W. A. Dempsey, the contracting officer designated in the contract of June 20, 1917, who was on July 16, 1917, succeeded by Col. I. W. Littell as contracting officer.

CONCLUSION.

It is respectfully submitted that the order herein prayed for should be granted.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.
JOHN E. HOOVER,
Attorney.

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